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Supreme Court of the United States

October Term, 1957

No. 333

STRATHMORE SHIPPING CO., INC.,
Petitioner,

against

COASTAL OIL COMPANY,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Question Presented

No question of law is presented by this petition. The sole issue is whether this Court will review the District Court's finding of fact that no oral agreement was made to extend the cancelling date of the STRATHBAY charter from April 30, 1952 to May 10, 1952.

Statement

All negotiations for an extension of the cancelling date were had in telephone conversations between petitioner's chartering broker, Joseph Winterberger, and respondent's vice-president, James Martell, both of whom testified in

General Pictures Corp. v. Western Electric Co., 304 U. S. 175, 178), we shall not here undertake to detail all the conflicts in the testimony or the evidence negating the making of the alleged oral agreement. By way of example we point out only that although petitioner states that it and Winterberger did not become aware of respondent's denial of the making of the alleged agreement until November 1955 (Pet., p. 12), this is in direct conflict not only with Martell's testimony that on April 21, 1952 he told Winterberger "very definitely that we had not agreed to an extension (R. 126)", but also with Winterberger's own initial spontaneous outburst on his deposition (R. 90). The District Court's findings are in accord (Findings 3 and 5, R. 10).

Petitioner also conveniently fails to mention any evidence negating the making of the alleged extension agreement though there was much of it, including some from petitioner's own witnesses. For example, note the admitted alterations in Winterberger's office diary (Exh. A), including, in particular, his erasure of the word "agreed" after the very proposal claimed to have been agreed to by respondent (R. 82).

As the Court of Appeals noted, the evidence was "conflicting" (Petitioner's Appendix, p. 28). This is not the place to review conflicts of evidence or the fact findings of the Courts below. *National Labor Relations Board v. Pittsburgh Steamship Co.*, 340 U. S. 498, 503; *McAllister v. United States*, 348 U. S. 19, 20.

Argument

As indicated above, the sole issue on the trial was whether, in a telephone conversation between Winterberger and Martell on or about April 18, 1952, Martell accepted, or did not accept, Winterberger's proposal that he extend the cancelling date of the charter from April 30 to

May 10, 1952. Obviously the District Court's determination on this narrow issue is of no importance to anyone other than the parties to this case. The credibility of Martell versus Winterberger was for the District Judge who found Martell's testimony "in substance credible" (R. 12). *Hoode v. Olsen*, 326 U. S. 271, 279; *Broadcast Music, Inc., v. Havana Madrid Restaurant Corp.*, 2 Cir., 175 F. 2d 77, 80.

No question of interpreting the charter-party language that "the Vessel shall proceed with all convenient dispatch" to the loading port arose or was decided by either the District Court or the Court of Appeals and neither court's decision has the slightest significance either to the "shipping industry" or "admiralty law" (Pet., p. 24). The District Court merely adverted to the change in the proposed written addendum requiring the vessel to proceed to Corpus Christi immediately upon discharge of her molasses cargo as one of several "facts" supporting respondent's version of the earlier telephone conversation between Martell and Winterberger, in addition to "Besides" the testimony of Martell which it found "in substance credible" (R. 11-12). No question of law as to the meaning of the phrase "all convenient dispatch" was in any way involved or decided. The Court simply felt that since part of the telephone conversation in which the alleged oral agreement was claimed by petitioner to have been made, the parties added a special clause to the proposed written addendum, this fact tended to provide some additional support for the finding that an agreement was not reached in the prior telephone conversation.

Petitioner has no basis whatever concerning what petitioner terms "well established fundamental in the shipping industry" (Pet., p. 24), nor was there any evidence that any of the negotiations dealing with the change in the proposed addendum were familiar with what petitioner says is so "fundamental". On the contrary, it is clearly to be inferred from

the direct testimony of petitioner's broker, Winterberger, that he did not regard the original charter provision for "convenient dispatch" as precluding a short intermediate cross-Gulf voyage if the cancelling date should be extended to May 10. He testified that the vessel was to report "on this charter with convenient dispatch" and that "with a sufficient time it was conceivable that she could have made a short voyage before reporting on the Coastal charter" (R. 55), and before dictating the clause to be inserted in the proposed addendum, he found it necessary to obtain petitioner's approval (R. 55). Similarly, Martell clearly regarded the insertion of the clause as necessary and important from respondent's standpoint (R. 126, 146-147). In sum, the insertion of the clause was mutually regarded as needed to cover something that had been "left open" in the oral negotiations and, whether technically a "change" or not, the District Court properly inferred that putting it in the addendum militated against a complete and binding oral agreement's having been reached in the earlier telephone conversation between Winterberger and Martell, as claimed by petitioner.

The District Court's reference to the fact that such a change was made in the addendum plainly does not conflict in any sense with any of the decisions or authorities referred to by petitioner. We should perhaps add, however, that it is far from clear law that where, as here, the charter grants the charterer the option to cancel upon the failure of the vessel to arrive by a specified date, the charterer may cancel if the vessel arrives before that date on the ground that she did not proceed with reasonable or convenient dispatch. *Rosasco v. Pitch Pine Lumber Co.*, 2 Cir., 138 F. 25, affirming 131 F. 437, cert. den. 198 U. S. 585, implies, at least, that under such circumstances the charterer may not cancel but may only sue for damages in doubtful remedy at best. Indeed, even where there is no cancelling date in the charter, as in *Olsen v. Hunter-Bremner Co.*, 54 F. 559, and *London v. Brock*, 2 Wall. 169 U. S.

728 (Pet., pp. 19-20), there is respectable authority that failure of the vessel to proceed with reasonable dispatch does not entitle the charterer to cancel unless the delay becomes so substantial as to frustrate the object of the charter. *Hildebrand v. Geneva Mill Co.*, D. C. Ala., 32 F. 2d 343, 348; *Scrutton, Charter Parties and Bills of Lading*, 16th Ed., pp. 109-11, collecting English cases.

Petitioner's assertion that this case involves a question whether an oral agreement modifying a written charter must be reduced to writing and signed by the parties in order to be effective (Pet., pp. 3, 23-24) can only be described as spurious. Respondent expressly conceded at the opening of the trial that "if a new oral agreement can be proved, it is perfectly legal" and that the only issue was the question of fact whether or not the oral agreement was made (R. 29). The District Judge himself stated expressly that the only question was "the factual one" whether the alleged extension agreement was made in the telephone conversation between Winterberger and Martell on or about April 18, 1952 (R. 11), and the Court of Appeals noted that the trial "was solely concerned with the question whether the parties had agreed to the oral extension" (Petitioner's Appendix, 28).

Petitioner selects (Pet., pp. 13-14) a number of so-called "factors extraneous to the critical telephone conversation" which it claims lead to the "inevitable conclusion" that the alleged oral agreement was made. We need only say that each and every one of these "factors" was stressed again and again by petitioner in both Courts below and was shown by respondent to be entirely consistent with respondent's position that there was no agreement. The District Court disposed of petitioner's argument based on these factors by saying:

> "All the facts and circumstances relied upon by the libellant as proving an oral modification, we think, are as consistent with its non-existence * * *" (R. 12)

and the Court of Appeals upheld the District Court's findings as "not clearly erroneous." (Petitioner's Appendix, p. 28.) Cf. *United States* v. *Yellow Cab Co.*, 338 U. S. 338, 342.

This Court, being a court of law "rather than a court for correction of errors in fact finding", should not undertake to review the findings of the two Courts below. *Graver Manufacturing Co.* v. *Linde Co.*, 336 U. S. 271, 275.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Dated: New York, August 26, 1957.

Respectfully submitted,

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Counsel for Respondent.